

No. 10966

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Appellant,

VS.

THE RAILROAD CREDIT CORPORATION,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

APR 2 - 1945

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the District Court of the United States
For the Northern District of California
Southern Division

No. 23307-S

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE RAILROAD CREDIT CORPORATION,
Defendant.

BILL OF COMPLAINT

The Western Pacific Railroad Corporation, plaintiff herein, complaining of the above named defendant, The Railroad Credit Corporation, respectfully shows:

I.

That the plaintiff, as is also the defendant, is a domestic corporation created by and existing under the laws of the State of Delaware.

II.

That this is a civil action in equity arising under the Constitution and laws of the United States of America and the amount in controversy exclusive of interest and costs exceeds the sum of [1*] \$50,000.00.

III.

That on or about March 25, 1933, as evidenced by an instrument in writing dated as of said date, the

*Page numbering appearing at foot of page of original certified Transcript of Record.

plaintiff assigned to the defendant, as accommodation collateral for certain notes of The Western Pacific Railroad Company, in addition to collateral owned by and pledged thereunder by said last Company, the following indebtedness due the plaintiff, viz:

(a) \$110,000 due the plaintiff from and by Standard Realty and Development Company secured by a mortgage on certain real property in the State of California;

(b) \$856,260 due the plaintiff from and by Sacramento Northern Railway, together with accrued unpaid interest from November 1, 1931.

IV.

That on or about August 2, 1935, said The Western Pacific Railroad Company filed a petition in the District Court of the United States for the Northern District of California, Southern Division, stating, among other things, that it was unable to meet its debts as they matured, and that it desired to effect a Plan of Reorganization under the provisions of Section 77 of the Act of Congress of July 1, 1898, entitled "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as amended, and thereafter such proceedings were had that a Plan of Reorganization of said The Western Pacific Railroad Company was approved by the Interstate Commerce Commission and was certified by it to the United States District Court for the Northern District of California, Southern Division, which Court by Order dated

August 15, 1940 approved said Plan of Reorganization in all respects. Said Order was reversed upon appeal by the Circuit Court of Appeals, Ninth Circuit, on November 28, 1941; in re Western Pacific Railroad Company, 124 F. 2d, 136, but was affirmed by the Supreme Court of the United States on March 15, 1943, which reversed the judgment of the Circuit Court of Appeals; Institutional Bondholders Committee vs. The Western Pacific Railroad Corporation, 318 U. S. 448. The Reports of the Interstate Commerce Commission underlying said Plan of Reorganization appear in Official Reports of the Interstate Commerce Commission, Volume 230, pages 61 et seq.; Volume 233, pages 409 et seq.; and Volume 236, pages 1 et seq. and together with the judicial opinion already mentioned may be referred to by either party on any hearing of this cause.

V.

That subsequent to the decision of the Supreme Court of the United States rendered March 15, 1943, said Plan of Reorganization was submitted by the Interstate Commerce Commission pursuant to said Section 77 of the Bankruptcy Act, as amended, for acceptance or rejection by all classes of creditors of The Western Pacific Railroad Company entitled to vote thereon, and was accepted by more than 66 2/3% of each class of such creditors including the defendant, The Railroad Credit Corporation, which took such action without asking or securing

the approval and consent of the plaintiff as the owner of the accommodation collateral hereinbefore specified.

VI.

That said Plan of Reorganization is to be effective by its terms as of January 1, 1939, and the new securities issuable thereunder are to be issued as of said date and such thereof as bears interest are to bear interest from said date and as appears from the opinion of this Court approving said Plan the claimants or creditors entitled to receive such new securities including interest to the effective date of said Plan are as follows: [3]

Claim or interest	Principal of claim or interest	Accrued interest at contract rate to effective date of Plan
First Mortgage 5% Bond.....	\$49,290,100.00	\$13,143,776.66
Reconstruction Finance Corporation Collateral Notes....	2,963,000.00	889,869.98
The Railroad Credit Corporation Collateral Notes	2,445,609.88	145,314.23
A. C. James Co. Collateral Notes	4,999,800.00	1,249,950.00

VII.

That the First Mortgage Bonds of The Western Pacific Railroad Company are secured by a first and paramount lien on all of the properties of The Western Pacific Railroad Company, except as found in the modified Report of the Interstate Commerce Commission dated June 21, 1939 that certain assets pledged under the General and Refunding Mortgage of The Western Pacific Railroad Company and having a value not in excess of \$1,879,965 are subject to said last mentioned mortgage

as a first and paramount lien thereon. In consequence of the lien position of the First Mortgage the holders of the First Mortgage Bonds were entitled under the rule of strict priority to be made whole before any part of the trust estate covered by said First Mortgage could be made available to junior lien creditors, except that recognition might be given to such junior creditors as their equities might appear up to but not exceeding in the aggregate the aforesaid sum of \$1,879,965.

VIII.

That by the provisions of said Plan of Reorganization the holders of said First Mortgage Bonds are allocated for each \$1000 principal amount thereof together with \$266.66 $\frac{2}{3}$ of interest accrued and unpaid thereon to January 1, 1939, approximately \$400 of Income Mortgage Bonds, Series A, being 40% of the [4] principal amount of said existing bonds, \$600 of 5% Preferred Stock, Series A, being 60% of the principal amount of said Bonds, and 4.67 shares of Common Stock, being Common Stock taken at the price of \$57 a share for 100% of said accrued and unpaid interest to January 1, 1939, and identical treatment was accorded to Reconstruction Finance Corporation in respect of principal indebtedness in the amount of \$2,963,000 and accrued and unpaid interest to January 1, 1939, in consideration of an undertaking to purchase at par \$10,000,000 principal amount of new First Mortgage Bonds in order to provide \$10,000,000 in cash to pay a like amount of Trustees' Certifi-

cates. That this allotment of new securities to holders of First Mortgage Bonds made said holders whole without exhausting the security underlying the First Mortgage and included compensation for their sacrifice of prior lien position through the issue of Common Stock at the price of \$57 a share or \$5 less than the value of such stock as fixed by the Plan of Reorganization in making whole the defedant, The Railroad Credit Corporation.

IX.

That by the provisions of said Plan of Reorganization the defendant, The Railroad Credit Corporation, is allocated in respect of its claim in the principal amount of \$2,445,610 together with \$146,503 of interest accrued and unpaid thereon to January 1, 1939, but subject to reduction as hereinafter stated approximately \$154,111 of Income Mortgage 4½% Bonds, Series A, \$241,681 of 5% Preferred Stock, Series A, and 35,425 shares of Common Stock being Common Stock taken at the price of \$62 per share. That this allotment of new securities made said defendant whole and included compensation for its sacrifice of prior lien position through the issue of Common Stock at the price of \$62 per share. That inasmuch as the defendant, The Railroad Credit Corporation, had been made whole by the allocation of the above securities, (a) without resorting to pledged interest of the [5] Railroad Company or its subsidiaries under the Marshalling and Distributing Plan paid subsequent to the effective date

of the Plan and prior to the issue of the new securities or (b) without resorting at all to the accommodation collateral, provision was made in the Plan that the amount of the claim of the defendant, The Railroad Credit Corporation, should be reduced by the amounts received under the Marshalling and Distributing Plan between those dates; and no attempt was made to bring under the jurisdiction of the Bankruptcy Court any part of the accommodation collateral, as would have been necessary if the defendant was not being made whole out of security pledged by the principal debtor.

X.

That after January 1, 1939 the plaintiff received from Standard Realty and Development Company \$42,500 principal and \$22,855.97 interest on account of advances to Standard Realty and Development Company pledged to the defendant, The Railroad Credit Corporation, and turned \$37,602.10 of said amounts over to the defendant, The Railroad Credit Corporation, awaiting the outcome of the submission of the Plan for acceptance or rejection by creditors; but that the plaintiff is advised that the Plan has now been accepted by the requisite percentage of all classes of creditors entitled to vote thereon and is now in process of consummation as of the effective date January 1, 1939, and that the plaintiff is entitled to a decree requiring the defendant to refund the sums so turned over to the defendant after January 1, 1939 and cancelling the assignment made by the plaintiff to the defendant

on or about March 25, 1933 of the plaintiff's advances to the Standard Realty and Development Company and the Sacramento Northern Railway Company.

IX.

That the cause of action herein asserted arises under and by reason of the orders and decrees of this Court and the [6] Supreme Court of the United States approving the Plan of Reorganization of the debtor certified to this Court by the Interstate Commerce Commission and necessarily involves an Interpretation of said orders and decrees and in consequent is a civil action in equity arising under the Constitution and laws of the United States of America.

Wherefore, the plaintiff prays:

1. That the accommodation collateral hereinabove described be adjudged and decreed to have been exonerated, released and discharged as security for the note or notes of The Western Pacific Railroad Company held by the defendant, The Railroad Credit Corporation;

2. That the defendant, The Railroad Credit Corporation, be directed and decreed to surrender to the plaintiff for cancellation the instrument of assignment or pledge dated March 25, 1933 hereinabove described;

3. That the defendant, The Railroad Credit Corporation, be decreed to refund and repay to the plaintiff all moneys turned over to the defendant by the plaintiff since January 1, 1939, representing amounts paid by Standard Realty and Development

Company on account of advances made to it by the plaintiff and assigned by the plaintiff to the defendant by the instrument of assignment or pledge dated March 25, 1933 hereinabove described; and

4. That the plaintiff have such other and further relief in the premises as may be agreeable to the principles of equity and as to the Court shall seem meet.

Dated: This 22nd day of May, 1944.

THE WESTERN PACIFIC
RAILROAD CORPORATION,
Plaintiff

By LEROY R. GOODRICH
Its Attorney

[Endorsed]: Filed May 22, 1944. [7]

[Title of District Court and Cause.]

ALTERNATIVE MOTION TO DISMISS OR
FOR SUMMARY JUDGMENT

Defendant moves the court to dismiss the action because the complaint fails to state a justiciable claims against defendant upon which relief can be granted, or in the alternative to grant summary judgment for defendant on the ground that the allegations of both law and fact and claims for relief set forth in said complaint are the same as or substantially similar to those raising the same issues of law and fact and asserting the same claims for relief which have been submitted to and are now

under consideration by this court in the pending action No. 26591-S, In the Matter of the Western Pacific Railroad Company, Debtor, in which action both the plaintiff and defendant herein are parties.

THE RAILROAD CREDIT
CORPORATION,

By EDWARD G. BUCKLAND
Its President and Attorney

[Endorsed]: Filed May 31, 1944. [8]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated that the above entitled matter may be set for hearing on June 2, 1944 at the hour of ten o'clock A.M., or as soon thereafter as may be convenient to the court.

Notice of hearing is waived.

Dated: This 23rd day of May, 1944.

LEROY R. GOODRICH

Attorney for Plaintiff

EDWARD G. BUCKLAND

Attorney for Defendant

[Endorsed]: Filed May 31, 1944. [9]

[Title of District Court and Cause.]

APPEARANCES

To the Clerk of the Above-Entitled Court:

Please enter my appearance as one of the attorneys for defendant The Railroad Credit Corporation, the defendant in the above entitled action, in association with Edward G. Buckland, Esq., and William J. Kane, Esq., my address is #333 Montgomery Street, San Francisco, 4, California, telephone: YUkon 1977.

ARTHUR B. DUNNE,

[Endorsed]: Filed Jun. 5, 1944. [10]

[Title of District Court and Cause.]

ORDER DISMISSING ACTION

Plaintiff sues for the return of securities delivered to defendant as accommodation collateral on certain indebtedness to defendant, and for other relief in connection therewith. Defendant moves to dismiss said action on the ground that the same issues of law and fact are presented to the court in Action No. 26591-S, In the Matter of the Western Pacific Railroad Company, Debtor, a reorganization proceeding under Section 77 of the Bankruptcy Act, in which both plaintiff and defendant herein are parties. It appears to the court that the subject matter of this suit is closely connected with and a part of the said reorganization proceeding,

and that the issues contained herein are set forth in the "Petition for Reorganization Committee for an Order Construing Plan of Reorganization" etc. dated May 9, 1944, now pending before the court, and should be determined in that proceeding. It is therefore

Ordered:

The motion to dismiss is granted.

Dated: June 19, 1944.

A. F. ST. SURE

United States District Court

[Endorsed]: Filed Jun. 19, 1944. [11]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT

To the Plaintiff Above Named and to Its Attorneys:

You are notified that on Monday, the 7th day of August, 1944, at 10:00 A.M. on said day, or as soon thereafter as counsel can be heard, defendant The Railroad Credit Corporation, by its attorneys, will move the above-entitled court, at its courtroom in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, to render and enter judgment herein against plaintiff and in favor of defendant and will request that said judgment be in the form of the copy hereto attached.

Said motion will be made upon all of the records, [12] papers, and files herein and upon the ground that this action has been finally concluded and determined by the order of the court granting the motion of said defendant heretofore made herein, and that upon the court's order of June 19, 1944, defendant is entitled to Judgment.

Dated: July 27th, 1944.

EDWARD G. BUCKLAND

WILLIAM J. KANE

ARTHUR B. DUNNE

Attorneys for Defendant The
Railroad Credit Corporation

(Admission of Service.)

In the United States District Court, in and for the
Northern District of California, Southern
Division

No. 23307-S

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE RAILROAD CREDIT CORPORATION,
Defendant.

PROPOSED JUDGMENT

The defendant, The Railroad Credit Corporation, duly served and filed herein its motion to dismiss

this action and for summary judgment. Said motion came on duly and regularly to be heard and was heard on June 2, 1944. On said hearing the parties were represented by their respective attorneys. Said motion was heard upon the complaint, defendant's motion, stipulations of the parties, and evidence introduced. The matter was then argued by counsel for the parties and submitted to the court, and the court being advised, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by its complaint herein and that this action be, and [14] the same is hereby dismissed and that defendant have and recover of and from plaintiff its costs of suit herein, taxed in the sum of \$.....

Done in Open Court this 7th day of August, 1944.

.....

United States District Judge

[Endorsed]: Filed Jul 31, 1944. [15]

In the United States District Court, in and for
the Northern District of California, Southern
Division

No. 23307-S

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

vs.

THE RAILROAD CREDIT CORPORATION,
Defendant.

JUDGMENT

The defendant, The Railroad Credit Corporation, duly served and filed herein its motion to dismiss this action and for summary judgment. Said motion came on duly and regularly to be heard and was heard on June 2, 1944. On said hearing the parties were represented by their respective attorneys. Said motion was heard upon the complaint, defendant's motion, stipulations of the parties, and evidence introduced. The matter was then argued by counsel for the parties and submitted to the court, and the court being advised, it is

Ordered, Adjudged and Decreed that plaintiff take nothing by its complaint herein and that this action be and the same is hereby dismissed and that defendant have and recover of and from plaintiff its costs of suit herein, taxed in the sum of \$20.85.

Done in Open Court this 7th day of August, 1944.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Aug. 7, 1944. [16]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Western Pacific Railroad Corporation, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order dismissing plaintiff's bill herein, made and entered on June 20, 1944, and from the judgment in the above entitled action entered on August 7, 1944.

Dated: This 16th day of September, 1944.

LEROY R. GOODRICH

Attorney for Plaintiff, The
Western Pacific Railroad
Corporation

[Endorsed]: Filed Sep. 18, 1944. [17]

Premium charge \$10.00
per annum

United States Fidelity and Guaranty Company
Baltimore - Maryland

[Title of District Court and Cause.]

\$250.00

COST BOND ON APPEAL

Know All Men By These Presents:

The We, Western Pacific Railroad Corporation, as Principal, and United States Fidelity and Guaranty Company, a corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid up capital stock of not less than Ten Million Dollars, duly incorporated under the laws of the State of Maryland, and having complied with all the requirements of the laws of the State of California and the United States of America respecting such corporations, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, are held and firmly bound unto Defendant in the sum of Two Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to it and its respective executors, administrators and successors, of which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 15th day of September, 1944.

Whereas the above named Plaintiff has prosecuted an appeal to the U. S. Circuit Court of Appeals, Ninth Circuit.

Now Therefore, the condition of this obligation is such that if the above named Plaintiff shall prosecute its said appeal to effect and answer all costs, if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

The undersigned Surety agrees that in case of any breach of any condition hereof, the Court may, upon no less than ten (10) days notice to the undersigned, proceed summarily to ascertain the amount which the undersigned, as Surety, is bound to pay on account of such breach and render judgment against it and award execution therefor not to exceed the sum specified in this Undertaking.

WESTERN PACIFIC RAIL-
ROAD CORPORATION

By LEROY R. GOODRICH

Principal

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By MILDRED DROST

Attorney-in-fact

State of California,
County of Alameda—ss.

On this 15th day of September in the year of our Lord One Thousand Nine Hundred and forty-four before me, J. C. Laney a Notary Public in and for said County and State, residing therein duly commissioned and sworn, personally appeared Mildred

Drost, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that she subscribed the name of the United States Fidelity and Guaranty Company, thereto as principal, and her own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official Seal, at my office in the County and State aforesaid, the day and year in this certificate first above written.

(Attorney-in-fact)

[Seal] J. C. LANEY

Notary Public in and for said County of Alameda,
State of California.

[Endorsed]: Filed Sep. 18, 1944. [18]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL AND TO
DOCKET ACTION IN CIRCUIT COURT
OF APPEALS FOR THE NINTH CIR-
CUIT

On September 18, 1944, The Western Pacific Railroad Corporation, plaintiff herein, filed its Notice of Appeal in the above entitled action from the Order dismissing plaintiff's bill, made and entered June 20, 1944, and from the Judgment in the above entitled action entered on August 7, 1944.

The Order dismissing said action was made by the court on the ground that the subject matter of said suit and the issues of law and of facts raised thereby, are contained in the "Petition of Reorganization Committee for an Order Construing Plan of Reorganization", filed May 9, 1944, in Action No. 26591-S, "In the Matter of The Western Pacific Railroad Company, debtor", and that both The Western Pacific Railroad Corporation and The Railroad Credit Corporation [19] were parties in said bankruptcy proceeding.

On September 14, 1944, this court made its Order determining the issues presented by the said Petition of the Reorganization Committee, including the issues as to certain accommodation collateral which are the subject matter of the above entitled action. From this order, both The Railroad Credit Corporation and The Western Pacific Railroad Corporation have, on October 13, 1944, filed Notices of Appeal. It is desired that the time for filing the Record on Appeal in both actions, and for the docketing of the same, be synchronized nearly as possible.

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant, The Western Pacific Railroad Corporation, may have to and including November 20, 1944 within which to file the Record on Appeal and to docket the action in the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 25th day of October, 1944.

A. F. ST. SURE

Judge of the District Court of the United States,
for the Northern District of California, South-
ern Division.

[Endorsed]: Filed Oct. 25, 1944. [20]

[Title of District Court and Cause.]

THE WESTERN PACIFIC RAILROAD COR-
PORATION'S DESIGNATION OF REC-
ORD ON APPEAL

On September 18, 1944, The Western Pacific Railroad Corporation appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Order of the above entitled court dismissing plaintiff's bill herein, made and entered on June 20, 1944, and from the judgment in the above entitled action entered on August 7, 1944. Reference is made to Notice of Appeal filed [21] in the above entitled matter on September 18, 1944.

The Western Pacific Railroad Corporation hereby designates the portions of the records, proceedings and evidence to be contained in the record on its said appeal as follows:

1. All file marks and endorsements upon all papers, documents and other matters hereinafter designated.

2. Bill of complaint of The Western Pacific Rail-

road Corporation against The Railroad Credit Corporation filed herein on May 22, 1944.

3. All of Items 1 to 25, both inclusive, all of Items 27 to 29, both inclusive, and all of Item 34, and each of said items, as the same are designated in the Designation of Record on Appeal filed by The Railroad Credit Corporation on its appeal, and as the same are designated in the Designation of Record on Appeal filed by The Western Pacific Railroad Corporation on its appeal to the United States Circuit Court of Appeals, Ninth Circuit, in an action in the District Court of the United States for the Northern District of California, Southern Division, entitled "In the Matter of The Western Pacific Railroad Company, debtor," being action numbered 26591-S, each of said appeals being from certain portions of the Order of the above entitled Court determining certain matters presented by the petition of Frederick H. Ecker, Frank C. Wright and Robert E. Coulson, members of the Reorganization Committee in the above entitled matter, which said Petition was filed herein on May 9, 1944. Each of said appeals was filed in the District Court, in said action numbered 26591-S, on October 13, 1944.

4. Alternative motion to dismiss or for summary judgment, filed herein by The Railroad Credit Corporation on May 31, 1944.

5. Stipulation by The Western Pacific Railroad Corporation and The Railroad Credit Corporation, filed herein on May 31, 1944.

6. Appearance of Arthur B. Dunne, as attorney

for The [22] Railroad Credit Corporation, filed herein June 5, 1944.

7. Order of the above entitled court dismissing plaintiff's action made on June 19, 1944.

8. Notice of motion by defendant for Judgment, filed herein on July 31, 1944.

9. Judgment rendered and entered herein on August 7, 1944.

10. Notice of Appeal of The Western Pacific Railroad Corporation, filed herein on September 18, 1944.

11. Bond for costs on appeal made by United States Fidelity and Guaranty Company on behalf of The Western Pacific Railroad Corporation, filed herein on September 18, 1944.

12. Order Extending Time within which to file Record on Appeal and to docket action in the Circuit Court of Appeals, Ninth Circuit, made by the above entitled Court and filed on October 25, 1944, and proof of service thereof.

13. A copy of this designation.

14. A copy of the Statement of Points on which appellant The Western Pacific Railroad Corporation intends to rely, filed herein with this designation.

13. The issues involved in the appeal of The Western Pacific Railroad Corporation in the above entitled matter are substantially the same as the issues involved in the appeal in action number 26591-S entitled, "In the Matter of The Western Pacific Railroad Company, Debtor", now pending in this Court, filed on October 13, 1944 by The

Western Pacific Railroad Corporation from the Order Construing Plan of Reorganization, made by this Court and filed on September 14, 1944, and are a part of the issues raised by the appeal of The Railroad Credit Corporation from the same Order, filed October 13, 1944.

For the purpose of shortening the record on appeal herein, The Western Pacific Railroad Corporation and The Railroad Credit Corporation have agreed to file, and will file herein, a stipulation that the Circuit Court of Appeals for the Ninth Circuit [23] may make an order consolidating the appeal herein with the appeals hereinabove referred to, in action numbered 26591-S, for briefing, for oral argument and the purposes of the record, and permitting shortening of the Record on Appeal herein, and providing that each and every item or part of the record on appeal as filed by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation shall be deemed a part of the transcript of the record on the appeal of The Western Pacific Railroad Corporation in the above entitled action.

When said stipulation by The Western Pacific Railroad Corporation and The Railroad Credit Corporation is filed herein, and when said Order of the Circuit Court of Appeals, consolidating said appeals and consolidating and shortening the said records on appeal, is filed in the above entitled action, then such stipulation and order are hereby designated for inclusion in the transcript of record here-

by designated in lieu of the matters described and designated in Item 3 in this designation.

Dated: This 15th day of November, 1944.

LEROY R. GOODRICH

Attorney for Plaintiff, The
Western Pacific Railroad
Corporation

[Endorsed]: Filed Nov. 18, 1944. [24]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH THE
WESTERN PACIFIC RAILROAD COR-
PORATION WILL RELY

The Western Pacific Railroad Corporation has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order made by the above entitled District Court, in the above entitled matter, on June 19, 1944 dismissing said action, and from the Judgment filed therein on August 7, 1944. [25]

Appellant hereby makes the following statement of points upon which it will rely on its appeal:

1. That the District Court was in error in making its Order of June 19, 1944, dismissing said action on the ground that the subject matter thereof was connected with and a part of a proceeding, "In the Matter of The Western Pacific Railroad Company, Debtor", No. 26591-S, then pending before said District Court, and that the issues contained

in the above entitled action were among the issues set forth in said action No. 26591-S in a "Petition of Reorganization Committee for an Order Construing Plan of Reorganization", and that said issues should be determined in said Reorganization proceeding.

The issues presented in the above entitled action **concerned the disposition of certain collateral** assigned on March 25, 1933 by The Western Pacific Railroad Corporation to The Railroad Credit Corporation, as further security for certain loans or advances made by said Credit Corporation to The Western Pacific Railroad Company. This collateral consisted of claims of The Western Pacific Railroad Corporation against The Standard Realty and Development Company, and against Sacramento Northern Railroad for money advanced each of said companies. They were not the property of the debtor, the Railway Company. They were not a part of, nor in any manner disposed of or affected by the Plan of Reorganization of The Western Pacific Railroad Company.

The rights of The Western Pacific Railroad Corporation, as assignor and of The Railroad Credit Corporation, as assignee, of said collateral were not properly determinable in the bankruptcy action. The petition in said action, then before said Court, in said Reorganization Proceeding was for an interpretation and construction of the Plan, of which said rights in said collateral were in no way a part. The District Court erred in declining to take jurisdiction of the issue raised under the above [26] en-

titled action, No. 23307-S and in granting defendant's motion to dismiss.

2. For the same reasons, the Court was in error in its Judgment, rendered and filed in the above entitled matter, on August 7, 1944.

LERROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corpora-
tion

[Endorsed]: Filed Nov. 18, 1944. [27]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL AND TO
DOCKET ACTION IN THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

On June 19, 1944 this Court made an Order dismissing plaintiff's bill in the above entitled action, on the ground that the subject matter of said suit, and the issues of law and of fact raised thereby, were contained in the "Petition of Reorganization Committee for an Order Construing Plan of Reorganization", filed May 9, 1944 in Action No. 26591-S, "In the Matter of The Western Pacific Railroad Company, debtor", and that both The Western Pacific Railroad Corporation and the Railroad Credit Corporation were parties in said Reorganization proceeding. On August 7, 1944 judgment was

entered in the above entitled action in favor of defendant. From this Order of June 19, 1944 and said Judgment of August 7, 1944, The Western Pacific Railroad Corporation has appealed, and has filed its Designation [28] of Record and its Statement of Points on which it will rely on appeal.

On September 14, 1944 in Action No. 26591-S, this Court made its Order determining the issues raised by said Petition of the Reorganization Committee, including the issues as to accommodation collateral which are the subject matter of the above entitled action, No. 23307-S. From this Order both The Railroad Credit Corporation and The Western Pacific Railroad Corporation have appealed, and have filed their respective Designations of Record and Statements of Points on said appeals.

It appears to the Court that further time will be required for the Clerk of this Court to prepare and perfect the records on said appeals for filing and docketing in the Circuit Court of Appeals.

Good Cause Appearing Therefor, It Is Hereby Ordered that appellant in the above entitled action, The Western Pacific Railroad Corporation, may have to and including December 16, 1944 within which to file its Record on Appeal and to docket the same in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered that the clerk of the District Court shall include a copy of this Order in the Record on Appeal in the above entitled matter.

Dated this 20th day of November, 1944.

A. F. ST. SURE

Judge of the District Court of the United States,
for the Northern District of California, South-
ern Division.

[Endorsed]: Filed Nov. 20, 1944. [29]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

State of California

County of Alameda—ss.

T. O. Laine, being first duly sworn, deposes and says:

I am a citizen of the United States and a resident of the County of Alameda, over the age of Twenty-one years, and not a party to or in anywise interested in the above entitled matter; that I am in the employ of the attorney for The Western Pacific Railroad Corporation in the above entitled matter, and my place of [30] business is 1002 Bank of America Building, Oakland, California; that on the 20th day of November, 1944, I deposited a full, true and correct copy of "The Western Pacific Railroad Corporation's Designation of Record on Appeal" (a copy of which is hereto attached), a full, true and correct copy of "Statement of Points on Which the Western Pacific Railroad Corporation will Rely" (a copy of which is hereto attached), and a full, true and correct copy of "Order

Extending Time within Which to File Record on Appeal and to Docket Action in the Circuit Court of Appeals for the Ninth Circuit'' (a copy of which is hereto attached), in the United States mail in said City of Oakland, County of Alameda, State of California, in a sealed envelope, with the postage thereon fully prepaid, addressed to:

Arthur B. Dunne, Esq.

Edward G. Buckland, Esq.

William J. Kane, Esq.

as attorneys for The Railroad Credit Corporation

333 Montgomery Street

San Francisco 4, California

T. O. LAINE

Subscribed and sworn to before me this 20th day of November, 1944.

[Seal] LEROY R. GOODRICH

Notary Public in and for the County of Alameda,
State of California

(“Attached to the original of the foregoing affidavit of service by mail, as the same was filed, were copies of the Statement of Points and Designation of Record referred to in said affidavit which are not herein repeated because they appear elsewhere in this transcript.”)

[Endorsed]: Filed Dec. 5, 1944. [31]

[Title of District Court and Cause.]

CERTIFIED COPY OF STIPULATION FILED
IN THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, AND ORDER ON SAID STIPU-
LATION, IN RESPECT OF RECORD ON
APPEAL [32]

In the United States Circuit Court of Appeals
Ninth Circuit

No.

In the matter of certain appeals in the following
actions now pending in the United States Dis-
trict Court for the Northern District of Cali-
fornia, Southern Division: "In the Matter
of The Western Pacific Railroad Company,
debtor", Action No. 26591-S, and "The West-
ern Pacific Railroad Corporation v. The Rail-
road Credit Corporation", Action No. 23307-S.

STIPULATION FOR AN ORDER TO SHORTEN
THE RECORDS ON APPEAL AND TO
CONSOLIDATE APPEALS FOR BRIEF-
ING, FOR ORAL ARGUMENT AND FOR
USE OF THE RECORD

I.

There is now pending in the United States Dis-
trict Court for the Northern District of California,
Southern Division, an action #26591-S, entitled,
"In the matter of The Western Pacific Railroad
Company, debtor", a proceeding for reorganization

of said railroad company under Section #77 of the Federal Bankruptcy Act. In said action The Railroad Credit Corporation and The Western Pacific Railroad Corporation appeared as creditors of the debtor. On May 9, 1944 the Reorganization Committee filed a petition asking the District Court to construe the Plan of Reorganization of the debtor. A hearing upon said petition was had on June 2, 1944 in the District Court.

On September 14, 1944 the District Court made an order in said proceeding, construing the Plan of Reorganization then before said court.

From said order of the District Court, The Railroad Credit Corporation and The Western Pacific Railroad Corporation have filed separate appeals. Each of said appellants has filed [33] its designation of record on said appeals.

II.

There is now pending in the said District Court an action #23307-S, entitled, "The Western Pacific Railroad Corporation, plaintiff, vs. The Railroad Credit Corporation, defendant". By stipulation of plaintiff and defendant the hearing of said action, and of a motion by defendant for dismissal thereof, was heard by the District Court on June 2, 1944, and in the same proceeding and upon the same showing, evidence and record, except as to pleadings as the hearing of the aforesaid Petition of the Reorganization Committee in action #26591-S. On June 19, 1944 the District Court made an order dismissing said action #23307-S. On August 7, 1944

said District Court filed a judgment therein for defendant.

From this order and from said judgment, The Western Pacific Railroad Corporation has appealed and has filed its designation of record on appeal.

III.

It is the desire of both parties to avoid unnecessary duplication of the record in these several appeals, to save expense and labor and the time of the court, in the printing and reading of briefs and in the hearing of oral argument in connection therewith.

It Is Therefore Hereby Stipulated by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation that an Order be made by the Circuit Court of Appeals for the Ninth Circuit, as follows:

(a) That the appeals separately filed by The Railroad Credit Corporation and The Western Pacific Railroad Corporation, on October 13, 1944, in the proceeding entitled "In the Matter of The Western Pacific Railroad Company, debtor". #26-591-S, and the [34] appeal filed by The Western Pacific Railroad Corporation on September 18, 1944 in the proceeding entitled, "The Western Pacific Railroad Corporation, plaintiff, vs. The Railroad Credit Corporation, defendant". #23307-S be consolidated for briefing and for oral argument, and may be heard upon the same record.

(b) That since the action entitled "The Western Pacific Railroad Corporation vs. The Railroad Cre-

dit Corporation", #23307-S, was determined upon the same evidence and record, except as to pleadings, and in the same hearing, as the Reorganization matter, action #26591-S, there need not be repeated and included in the transcript of record on appeal by The Western Pacific Railroad Corporation in said plenary action #23307-S any item or part of the record on appeal which may be included in the records on appeal in action #26591-S.

(c) That the transcript of proceedings in the District Court on June 2, 1944, and other matters of record set forth and designated in the record on appeal in either of said actions, may be used or referred to by either The Railroad Credit Corporation or The Western Pacific Railroad Corporation in their briefs, or appendices thereto, or reproduced therein, as matter included in the transcript on appeal in respect to each of the appeals hereby consolidated.

(d) That The Railroad Credit Corporation and The Western Pacific Railroad Corporation shall file a certified copy of this stipulation and of said order in the United States District Court for the Northern District of California, Southern Division, in the said matter #26591-S, and in the said matter #23307-S, and that the Clerk of said District Court shall include in the transcript of record in each of said actions a copy of this order, in preparing and certifying the same.

Dated: November 27, 1944.

THE RAILROAD CREDIT
CORPORATION

By ARTHUR B. DUNNE

Its Attorney

THE WESTERN PACIFIC
RAILROAD CORPORATION

By LEROY R. GOODRICH

Its Attorney [35]

ORDER TO CONSOLIDATE APPEALS AND
TO SHORTEN RECORD

The foregoing Stipulation having been read and
approved, and

Good cause appearing therefor,

It Is So Ordered.

CURTIS D. WILBUR

Senior United States Circuit
Judge

A True Copy;

Attest: Nov. 28, 1944.

PAUL P. O'BRIEN

Clerk

[Endorsed]: Filed Nov. 28, 1944. Paul P. O'Brien
Clerk.

[Endorsed]: Filed Nov. 29, 1944. [36]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE RECORD ON APPEAL, AND TO
DOCKET ACTION IN CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

There is now pending in the United States District Court for the Northern District of California, Southern Division, and action numbered 23307-S entitled "The Western Pacific Railroad Corporation v. The Railroad Credit Corporation", On June 20, 1944 the District Court made an order dismissing plaintiff's action and on August 7, 1944 the District Court filed a judgment in said action in favor of the defendant.

On September 18, 1944 The Western Pacific Railroad Corporation filed its notice of appeal from said order and said judgment and thereafter filed in said District Court its designation of record on appeal and statement of points on which said appellat will rely. Thereafter the District Court made an order extending time for the filing of said record on appeal and the docketing of said appeal in the Circuit Court of Appeals for the Ninth Circuit to and including December 16, 1944. Due to the extensiveness of the matters to be contained in the transcript of the record on appeal the Clerk of said District Court is unable to prepare the transcript of the record on appeal with the allotted time and it is desired that additional time be granted by this court for the filing of the record on appeal and for the docketing of the action.

Good Cause Appearing Therefor, it is hereby ordered that the appellant, The Western Pacific Railroad Corporation, may have to and including January 15, 1945 within which to file the record on appeal and to docket said action in the Circuit Court of Appeals Ninth Circuit. [37]

And It Is Further Ordered that the Clerk of the District Court shall include a copy of this order in the record on appeal in the above entitled matter.

CURTIS D. WILBUR

United States Circuit Judge

Dated: December 15, 1944.

A True Copy.

Attest: Dec. 15, 1944

PAUL P. O'BRIEN

Clerk.

[Endorsed]: Filed Dec. 15, 1944. Paul P. O'Brien,
Clerk

[Endorsed]: Filed Dec. 15, 1944. C. W. Calbreath,
Clerk. [38]

[Title of District Court and Cause.]

AMENDMENT AND SUPPLEMENT TO DESIGNATION OF RECORD ON APPEAL OF THE WESTERN PACIFIC RAILROAD CORPORATION

The Western Pacific Railroad Corporation's Designation of Record on Appeal, filed herein on

November 18, 1944, is amended and supplemented as follows:

Also include in the record on appeal the affidavit of T. O. Laine filed herein on December 5, 1944 showing service by mail of Statement of Points and Designation of Record on Appeal of The Western Pacific Railroad Corporation. [39]

Attached to said affidavit were copies of said Statement of Points and said Designation of Record on Appeal. These copies need not be repeated, but there may be substituted therefor the following statement:

“Attached to the original of the foregoing affidavit of service by mail, as the same was filed, were copies of the Statement of Points and Designation of Record referred to in said affidavit which are not herein repeated because they appear elsewhere in this Transcript.”

Also include in the record on appeal a copy of this Amendment and Supplement to Designation.

Dated: This 5th day of January, 1945.

LEROY R. GOODRICH

Attorney for The Western Pacific Railroad Corporation.

[Endorsed]: Filed Jan. 6, 1945. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRAN-
SCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of The Western Pacific Railroad Company, Debtor No. 26591 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Six & 40/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of January A. D. 1945.

[Seal]

C. W. CALBREATH

Clerk

E. H. Norman

Deputy Clerk [41]

[Endorsed]: No. 10966. United States Circuit Court of Appeals for the Ninth Circuit. The Western Pacific Railroad Corporation, Appellant. vs. The Railroad Credit Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH THE
WESTERN PACIFIC RAILROAD CORPO-
RATION INTENDS TO RELY, AND DES-
IGNATION OF RECORD TO BE RELIED
UPON AND APPLICATION FOR ORDER
IN RESPECT OF PRINTING RECORD

The Western Pacific Railroad Corporation on September 18, 1944 appealed from the order of the District Court of the United States for the Northern District of California, Southern Division, made and entered June 20, 1944 dismissing plaintiff's bill in an action numbered 23307-S in said Court, entitled "The Western Pacific Railroad Corporation, plaintiff vs. The Railroad Credit Corporation, defendant", and from the judgment in said action entered on August 7, 1944.

On November 18, 1944 appellant filed in said District Court its "Statement of Points on Which The Western Pacific Railroad Corporation Will Rely", and "The Western Pacific Railroad Corporation's Designation of Record on Appeal", and thereafter filed its affidavit of service of true and correct copies of said documents upon defendant and appellee, The Railroad Credit Corporation, which said documents are included in the original certified record on appeal in the above entitled matter and which appear therein at the following pages:

Statement of Points on which 'The Western Pacific Railroad Corporation Intends to Rely, Page 25—Original Certified Record.

The Western Pacific Railroad Corporation's Designation of Record on Appeal, Page 21—Original Certified Record.

Affidavit of Service by Mail, Page 30—Original Certified Record.

The Western Pacific Railroad Corporation hereby states that on this appeal it intends to rely on those points set out and designated in the above "Statement of Points on Which The Western Pacific Railroad Corporation Intends to Rely."

The Western Pacific Railroad Corporation further states that those documents designated in the above "The Western Pacific Railroad Corporation's Designation of Record on Appeal" are necessary for the consideration of the Court on this appeal.

Certain of the documents so designated were heretofore certified to the above entitled Court in that certain matter in the above entitled Court entitled

and numbered in said Court, "In the Matter of The Western Pacific Railroad Company, debtor-Western Pacific Railroad Corporation, a corporation, et al, Appellants vs. Institutional Bondholders Committee, et al, Appellees, No. 9714. Heretofore and on November 21, 1944, the above entitled Court, on the application of appellants in this matter, The Railroad Credit Corporation and The Western Pacific Railroad Corporation made and filed its order in connection with the present appeals, authorizing the elimination from the original certified record on these appeals of all matters heretofore certified to this Court and contained in the records of this Court in the said matter in this Court No. 9714, upon the inclusion in the original certified record on these appeals of a copy of said order of this Court of November 21, 1944 contained in the original certified record on these appeals at page 163 thereof, and, accordingly, matters contained in the record in the said matter No. 9714 have been eliminated from the original certified record on these appeals.

On November 28, 1944 this Court, in pursuance and approval of a stipulation filed on that date by The Western Pacific Railroad Corporation and The Railroad Credit Corporation, made an Order to consolidate the appeals separately filed by The Railroad Credit Corporation and by The Western Pacific Railroad Corporation on October 13, 1944 in the proceeding entitled, "In the Matter of The Western Pacific Railroad Company, debtor", No.

26591-S, and the appeal filed by The Western Pacific Railroad Corporation on September 18, 1944 in the proceeding entitled "The Western Pacific Railroad Corporation vs. The Railroad Credit Corporation", numbered 23307-S, and that there need not be repeated and included in the transcript of record on appeal by The Western Pacific Railroad Corporation in said action No. 23307-S any item or part of the records on appeal in action No. 26591-S.

Appellant, The Western Pacific Railroad Corporation, prays that the said matters so included in the original certified record on these appeals by reference, but physically excluded in pursuance of said Orders of this Court of November 21, 1944, and of November 28, 1944 be not printed, and that this Court make its order accordingly, and that in said order this Court grant leave to the parties to make reference, or reproduce in their briefs, in respect to any of said appeals, any parts of said record physically excluded from the certified records on any of said appeals, in the same manner as though the said matters were printed as a part thereof.

Dated: January 15, 1945.

LEROY R. GOODRICH

Attorney for The Western
Pacific Railroad Corporation.
tion.

[Endorsed]: Filed Jan. 15, 1945. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER IN RESPECT OF PRINTING OF
RECORDS

Good Cause Appearing Therefor, It Is Ordered that in printing the record on appeals in the above entitled matters it shall be necessary to print only the matter physically contained in the original certified records as certified to this court by the Clerk of the United States District Court for the Northern District of California, Southern Division, and it shall not be necessary to print any matter therein contained by reference by reason of the Order of this court made November 21, 1944, or the order of this court made November 28, 1944, a copy of which appears in said original certified records on appeal, and

It Is Further Ordered that any of the parties may refer to or reproduce in their briefs or as appendices thereto any matter appearing in the said records by reference, but physically excluded by reason of the aforesaid orders of this court.

Dated: January 15, 1945.

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Jan. 16, 1945. Paul P. O'Brien, Clerk.

